Supreme Court, U.S.
FILED

(1)

98 2015 JUN 16 1999

No.

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

INTERSTATE BRANDS CORPORATION,

Petitioner,

v.

BAKERY DRIVERS & BAKERY GOODS VENDING MACHINES, LOCAL UNION NO. 550, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

LEONARD SINGER
Counsel of Record
GREGORY D. BALLEW
BIOFF SINGER AND FINUCANE, LLP
Attorneys for Petitioner
The Stilwell Building
Suite 400
104 West Ninth Street
Kansas City, MO 64105-1718
(816) 842-8770

153328

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

7168

QUESTIONS PRESENTED FOR REVIEW

1. Where The Employer Sues The Union Under Section 303 of the Labor Management Relations Act For Damages Caused By The Union's Secondary Boycott, Does A General Arbitration Provision in Their Collective Bargaining Agreement Prohibit The Employer's Suit, Notwithstanding The Statutory Language and Congressional History And Intent Which Establish That Section 303 Damage Claims "Must Be By Direct Suit" in Federal Court In Order to Provide A "Tremendous Deterrent" To Secondary Boycotts?

2. May a Court Dismiss The Employer's Section 303 Action And Require The Employer to Arbitrate Its Damage Claim Even Though, As The Court Below Found, The General Arbitration Provision Does Not Clearly and Unmistakably Waive The Employer's Right to Direct Suit Under Section 303?

3. This Court Has Held That, In Labor Relations Matters, Any Waiver in A Collective Bargaining Agreement of Statutory Rights, Including The Right To A Judicial Forum, Must Be "Clear and Unmistakable". Does The Fact That The Employer Negotiated the Collective Bargaining Agreement Make It "Inappropriate" (As the Court Below Held) To Apply The "Clear and Unmistakable" Waiver Requirement?

STATEMENT PURSUANT TO RULE 29.6

Petitioner is Interstate Brands Corporation. Interstate Brands Corporation is the only wholly-owned subsidiary of Interstate Bakeries Corporation which is publicly owned. Ralston-Purina Company is the only publicly held company owning 10% or more of Interstate Bakeries Corporation's stock.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Statement Pursant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	ix
Citations of Opinions and Orders Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	1
Basis for Federal Jurisdiction in the Court of First Instance	3
Reasons for Granting the Writ	3
I. The Second Circuit's Decision Compelling Arbitration Is Contrary To Section 303's Language And Overrides Congressional History And Intent That The Assertion Of Section 303 Claims "Must Be By Direct Suit."	3

Contents

Page

II. The Second Circuit's Decision Conflicts With The Seventh Circuit's Decision That A Section 303 "Suit Would Not Be Barred By A Valid Arbitration Clause." 10

III. The Second Circuit's Decision Conflicts With The Relevant Decisions Of This Court And With Another Court Of Appeals That, Absent A "Clear And Unmistakable Waiver," A Party To A CBA Does Not Waive Its Statutory Rights. 11

Conclusion 14

TABLE OF CITED AUTHORITIES

Page

Cases:

ABF Freight System, Inc. v. NLRB, 510 U.S. 317 (1994) 9

Alexander v. Gardner-Denver Company, 415 U.S. 36 (1974) 10

Bechtel Corp. v. Local 215, 405 F. Supp. 370 (M.D. Pa. 1975), *aff'd on other grounds*, 544 F.2d 1207 (3rd Cir. 1976) 13

Brock v. Pierce County, 476 U.S. 253 (1986) 7

Carpenters District Council (Mfg. Woodworkers Assn.), 326 NLRB No. 31 (1998) 9

Collyer Insulated Wire, 192 NLRB 837 (1971) ... 8

Farmland Dairies, Inc. v. Milk Drivers & Dairy Employees Union Local 680, Inter. Broth. of Teamsters, AFL-CIO, 956 F. Supp. 1190 (D.N.J. 1997) 13

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 3, 8

Int'l Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp., 342 U.S. 237 (1952) 5

Cited Authorities

	Page
Ironworkers District Council of the Pacific Northwest, 292 NLRB 562 (1989), *enforced*, 913 F.2d 1470 (9th Cir. 1990)	8
Kaiser Steel Corp. v. Mullins, 455 U.S. 72 (1982)	8
Local 32B-32J, SEIU, 313 NLRB 392 (1993), *enforced as modified sub nom., SEIU, Local 32B-32J v. NLRB*, 68 F.3d 490, 495 (D.C. Cir. 1995)	8
McCarthy v. Maddigan, 503 U.S. 140 (1992)	7
Metropolitan Edison Company v. NLRB, 460 U.S. 693 (1983)	12
Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985)	3
Muniz v. Hoffman, 422 U.S. 454 (1975)	7
NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775 (1990)	9
Old Dutch Farms, Inc. v. Milk Drivers & Dairy Emp. Local 584, IBT, 359 F.2d 598 (2nd Cir. 1966), *cert. denied*, 385 U.S. 832 (1969)	13
Shearson American Express, Inc. v. McMahon, 482 U.S. 220 (1987)	3

Cited Authorities

	Page
Twin Excavating Co. v. Local Union No. 731, 337 F.2d 437 (7th Cir. 1964)	10
Uforma/Shelby Business Forms, Inc. v. NLRB, 111 F.3d 1284 (6th Cir. 1997)	12
United Steelworkers of America v. American Mfg. Co., 363 U.S. 563 (1960)	9, 10
United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960)	7, 9
United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960)	9, 10
Vulcan Materials Co. v. United Steelworkers, 430 F.2d. 446 (5th Cir. 1970), *cert. denied*, 401 U.S. 963, 91 S. Ct. 974 (1971)	12, 13
Waco Scaffolding Co. v. Local 845, 585 F. Supp. 102 (E.D. Pa. 1984)	13
Wright v. Universal Maritime Service Corp., 119 S. Ct. 391 (1998)	10, 11
Statutes:	
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1331	3

Cited Authorities

Page

The National Labor Relations Act, § 8(b)(4) —
29 U.S.C. § 158(b)(4) 1, 2, 5, 8

The National Labor Relations Act, § 8(e) —
29 U.S.C. § 158(e) 8, 9

The National Labor Relations Act, § 10 —
29 U.S.C. § 160 7

The National Labor Relations Act, § 10(k) —
9 U.S.C. § 160(k) 5, 6

The Labor Management Relations Act, § 203(d) —
29 U.S.C. § 173(d) 1, 6

The Labor Management Relations Act, § 303 —
29 U.S.C. § 187 ..... *passim*

Other Authorities:

93 Cong. Rec. 4256 (1947) 5

93 Cong. Rec. 5041 (1947) 4

93 Cong. Rec. 5046 (1947) 4

93 Cong. Rec. 5048 (1947) 4

93 Cong. Rec. 5060 (1947) 4

S. Rep. No. 105, 80th Cong., 1st Sess. 54 (1947) ... 7

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Second Circuit Dated And Decided January 29, 1999 ..... 1a

Appendix B — Memorandum And Order Of The United States District Court For The Eastern District Of New York Dated January 20, 1998 ..... 17a

Appendix C — Order Of The United States Court Of Appeals For The Second Circuit Denying Petition For Rehearing Dated And Filed March 18, 1999 ..... 39a

Appendix D — Relevant Statutes 41a

Interstate Brands Corporation, Petitioner, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

CITATIONS OF OPINIONS AND ORDERS BELOW

The Court of Appeals' opinion (App. A) is reported at 167 F.3d 764 (2nd Cir. 1999). On March 18, 1999, the Court of Appeals denied IBC's Petition for Rehearing. (App. C). The District Court's principal opinion (App. B) is reported at 1998 WL 19974, No. 96 CV 4454(SJ).

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on January 29, 1999. (App. A). On March 18, 1999, the Court of Appeals denied the Petition for Rehearing. (App. C). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The National Labor Relations Act, § 8(b)(4), 29 U.S.C. § 158(b)(4). The Labor Management Relations Act, § 303, 29 U.S.C. § 187, and § 203(d), 29 U.S.C. § 173(d) (App D).

STATEMENT OF THE CASE

On September 9, 1996, Respondent Teamsters Local 550 ("Union") commenced a strike against Petitioner Interstate Brands Corporation ("IBC") to force IBC to cease doing business with the Jacobson Companies which for

many years distributed IBC's Dolly Madison cake products in the New York metropolitan area. The Union and IBC were parties to a collective bargaining agreement (CBA) and the Union demanded that IBC use the Union's members who worked under the CBA to distribute the cake products. IBC filed an unfair labor practice charge with the National Labor Relations Board ("NLRB") alleging that the Union's strike constituted an unlawful secondary boycott in violation of section 8(b)(4) of the National Labor Relations Act ("NLRA"). Shortly thereafter, the Union entered into a settlement agreement with the NLRB and agreed to end the illegal secondary strike. As the Second Circuit found, "[r]ather than returning to work the next day, however, the Union expanded the strike to include IBC's Wonder Bread operation." App. A at 5a. The Union's secondary boycott strike caused substantial damage to IBC. Under Section 303[1] of the Labor Management Relations Act (LMRA), IBC sued the Union in federal District Court to recover its damages.

IBC did not contend that the Union's illegal strike violated the CBA. The Union argued that the CBA's grievance-arbitration provision covered a Section 303 damage action and barred IBC's Section 303 direct suit in federal court.[2] Holding that IBC had to submit its damage action to arbitration under the CBA, the District Court dismissed IBC's Section 303 action. IBC appealed. While

---

1. 29 U.S.C. § 187. App. D at 46a.

2. The arbitration provision covered "all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this Agreement, or any act or conduct or relation between the parties hereto, directly or indirectly."

noting the "absence of a clear, explicit statement" that IBC had waived its right to proceed under Section 303 in federal court, the Second Circuit held that this Court's decisions that a waiver of a statutory right to judicial remedies must be clear and unmistakable did not apply to IBC, affirmed the District Court, and denied IBC's petition for rehearing.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The United States District Court for the Eastern District of New York had jurisdiction under 29 U.S.C. § 187 and 28 U.S.C. § 1331.

REASONS FOR GRANTING THE WRIT

I.

THE SECOND CIRCUIT'S DECISION COMPELLING ARBITRATION IS CONTRARY TO SECTION 303'S LANGUAGE AND OVERRIDES CONGRESSIONAL HISTORY AND INTENT THAT THE ASSERTION OF SECTION 303 CLAIMS "MUST BE BY DIRECT SUIT."

Arbitration of federal statutory claims cannot be compelled if "Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Congress' intent is "discoverable in the text of the [federal law], its legislative history, or an 'inherent conflict' between arbitration and the [federal law's] underlying purposes . . ." . *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991), quoting *Shearson American Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987).

Congress intended that Section 303 claims would be submitted to federal courts, not to arbitration. The federal court is the only forum to which the text of Section 303 refers. App. D at 46a.

As to the legislative history, Senator Taft, who authored the relevant portions of the LMRA, stated as follows:

> . . . I think the threat of a *suit* for damages is *a tremendous deterrent* to the institution of secondary boycotts and jurisdictional strikes . . .
>
> . . . We considered making it a procedure through the National Labor Relations Board also, but it is not felt I think by any of those on the other side of these questions that the Labor Board is an effective tribunal for the purpose of trying to assess damages in such a case. I do not think anyone felt that that particular function should be in the Board. *So, if such remedy is to be provided at all, if there is to be any recourse for financial losses caused by unions, it must be by direct suit* . . .

(emphasis added). 93 Cong. Rec. 5060 (1947); *See also* 93 Cong. Rec. 5046 (1947) (statement of Sen. Taft: ". . . without the right to sue for damages, there is no recourse for a man who is injured by a secondary boycott."); 93 Cong. Rec. 5041 (1947) (statement of Sen. Ives: "Once it is established that recovery may be had for damages in the Federal courts, it will go a long way toward stopping the jurisdictional dispute and secondary boycott."); 93 Cong. Rec. 5048 (1947) (statement of Sen. Ball: "I think anyone who is injured by [secondary boycotts and

jurisdictional strikes] should have the right to go directly into court and obtain relief."). Section 303's opponents specifically identified the "whole issue" as whether the federal courts would be the proper forum.

> Mr. Morse. . . . Does the Senator agree with me that we must make clear to the Senate that the choice which must be made is whether we are going to try to do this by way of an administrative law approach, or by way of a so-called court approach?
>
> Mr. Ellender. That seems to present the whole issue, I will say to the Senator.

93 Cong. Rec. 4256 (1947) (statements of Sen. Morse and Sen. Ellender). As enacted, Section 303's "right to sue in the courts is clear, . . .". *Int'l Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp.*, 342 U.S. 237, 239-240 (1952) (reviewing Section 303 legislative history).

Congress considered arbitration for some aspects of secondary boycott claims under Section 8(b)(4). When Congress enacted Section 303, Congress also enacted Section 10(k), 29 U.S.C. § 160(k), which expressly defers some secondary jurisdictional disputes under Section 8(b)(4)(D) to the parties' "agreed upon methods for the voluntary adjustment of the dispute." Congress did not choose arbitration regarding the other types of secondary boycotts under Sections 8(b)(4)(A)-(C). Congress chose arbitration where appropriate as the forum for certain aspects of secondary boycott disputes but, in order to achieve the "tremendous deterrent" of federal court proceedings, rejected arbitration as the forum for Section 303 damage actions.

Additionally, at the same time that Congress provided for direct suits under Section 303, Congress enacted Section 203(d) of the LMRA which provides as follows:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the *application or interpretation of an existing collective bargaining agreement.*

(Emphasis added) 29 U.S.C. § 173(d), App. D at 45a. Thus, Congress simultaneously considered, on the one hand, "direct suit" for Section 303 claims and, on the other, arbitration for claims concerning the "application or interpretation of an existing collective bargaining agreement", 29 U.S.C. § 173(d), and certain aspects of secondary boycott disputes, 29 U.S.C. § 160(k) (App. D at 46a-47a). Congress chose only direct suit for Section 303 damage claims.

If Congress had intended that Section 303 claims could be arbitrated, Congress either would have: (1) referred to Section 303 claims in Section 203(d); (2) referred to arbitration in Section 303; or (3) enacted a separate provision favoring arbitration for Section 303 actions. Instead, regarding what the opponents characterized as the "whole issue" and following Senator Taft's direction that, to be the most effective deterrent to secondary boycotts, the damage claim "must be by direct suit," Congress expressly and intentionally established a system under which the federal courts (not even the NLRB) would hear

Section 303 claims and arbitrators would hear breach of contract claims.[3]

Section 303's language and the legislative history establish that federal courts should not dismiss Section 303 damage claims because of arbitration clauses. *McCarthy v. Maddigan*, 503 U.S. 140, 144 (1992) (appropriate deference must be given to Congress' power to prescribe the basic procedural scheme under which a claim may be heard); *Brock v. Pierce County*, 476 U.S. 253, 263 (1986) (individual legislator's comments are evidence of Congress' intent where consistent with statutory language and other legislative history); *Muniz v. Hoffman*, 422 U.S. 454, 468-9 (1975) (A statutory section "may not be read apart from other relevant provisions of the labor law, that section likewise may not be read isolated from its legislative history and the revisions process from which it emerged, all of which place definite limitations on the latitude we have in construing it.").

In light of Congress' express purpose to use federal suits to deter secondary boycotts, there is an "inherent

3. As originally proposed, the LMRA would have allowed employers to directly seek injunctive relief against secondary boycotts. S. Rep. No. 105, 80th Cong., 1st Sess. 54-55 (1947). As enacted, the LMRA allows only the NLRB to seek injunctive relief against secondary boycotts. 29 U.S.C. § 160. The Second Circuit's decision negates Congress' precise intent regarding the forums in which to resolve labor law claims. In so doing, the Second Circuit deprives the employer of the right to full appellate review of a District Court's Section 303 judgment and leaves the employer with the option to seek to vacate an arbitrator's award which is allowed only on extremely limited grounds. *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 599 (1960).

conflict" (*Gilmer*) between arbitration and the underlying purposes of Section 303's express right to direct suit in federal court.[4]

NLRB decisions further compel the conclusion that Section 303 claims are not arbitrable. The NLRB is the primary agency for the application of the NLRA and is empowered to hear Section 8(b)(4) disputes (but not damage actions). The NLRB recognizes the importance of arbitration and regularly defers appropriate issues under the NLRA to arbitration. *E.g., Collyer Insulated Wire*, 192 NLRB 837 (1971). Nonetheless, the NLRB does not compel the involuntarily deferral of secondary boycott disputes to arbitration. *Local 32B-32J, SEIU, infra*; *Ironworkers District Council of the Pacific Northwest,* 292 NLRB 562 (1989), *enforced,* 913 F.2d 1470 (9th Cir. 1990) (adopting ALJ decision: "Here, the disputed issues are not susceptible to interpretation under operation of the grievance machinery. An arbitrator is not authorized to determine whether . . . Respondents engaged in a secondary boycott

4. In an arbitration, including the arbitration ordered in this case, the arbitrator would have to decide whether the union violated Section 8(b)(4) and, if so, the nature and amount of any damages which the union owed the employer. Section 8(b)(4) violations which lead to Section 303 damage claims can be based upon conduct including an illegal contract provision (29 U.S.C. § 158(e) regarding hot cargo clauses), or even an illegal demand for arbitration. *Local 32B-32J, SEIU*, 313 NLRB 392 (1993), *enforced as modified sub nom., SEIU, Local 32B-32J v. NLRB*, 68 F.3d 490, 495 (D.C. Cir. 1995). A labor arbitrator cannot declare a part of the CBA to be illegal or hold that the arbitration itself is illegal. Courts decide these issues. *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 84 (1982). Compelling arbitration of Section 303 claims inherently conflicts with Section 303's underlying purpose and principles of labor arbitration.

. . . Furthermore, even if the arbitrator were authorized to decide these issues, he would have no power to remedy any violations found in a manner compatible with the purposes of the Act."); *Carpenters District Council (Mfg. Woodworkers Assn.)*, 326 NLRB No. 31 (1998) (Section 8(e) case [29 U.S.C. Section 158(e)]; NLRB stating: "Questions of statutory construction, as distinguished from contract interpretation, are legal questions concerning the National Labor Relations Act, which are within the special competence of the NLRB rather than of an arbitrator . . . Resolution of these issues necessarily involves the application of statutory policy, standards, and criteria, and is thus not appropriate for deferral to arbitration"). This Court is generally quite deferential to the NLRB's construction of the NLRA. *See ABF Freight System, Inc. v. NLRB*, 510 U.S. 317, 324 (1994) (NLRB's views entitled to "the greatest deference"); *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990) (NLRB has primary responsibility to develop and apply national labor policy). Because the NLRB has held that secondary boycott issues should not be involuntarily deferred to arbitration, the courts should not negate the Section 303 right to a federal forum by ordering arbitration.

By compelling arbitration of IBC's Section 303 claim, the Second Circuit's decision violates Congressional intent regarding an important question of federal law which has not been, but should be, settled by this Court.[5]

5. The *Steelworkers' Trilogy* established a presumption of arbitrability concerning only the arbitration of disputes regarding collective bargaining agreements. *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363

(Cont'd)

II.

THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THE SEVENTH CIRCUIT'S DECISION THAT A SECTION 303 "SUIT WOULD NOT BE BARRED BY A VALID ARBITRATION CLAUSE."

The Second Circuit's decision conflicts with the decision of another United States court of appeals on this important federal labor law matter. *Twin Excavating Co. v. Local Union No. 731,* 337 F.2d 437, 438 (7th Cir. 1964), addressed the following issue:

> . . . whether the Labor Management Relations Act [citation omitted] contemplated an arbitration proceeding as a substitute for a court hearing in a suit for damages under § 303 of the Act, where plaintiff and defendant are parties to a collective bargaining agreement.

Considering the legislative history and purpose of a Section 303 action, the Seventh Circuit correctly held that a Section 303 "suit would not be barred by a valid arbitration clause." *Id.* at 439.

(Cont'd)

U.S. 574 (1960); *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 563 (1960). The *Trilogy's* presumption is based upon ". . . the specialized competence of arbitrators [which] pertains primarily to the law of the shop, not the law of the land". *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 57 (1974). *See also, Wright v. Universal Maritime Service Corp.*, 119 S. Ct. 391, 395 (1998) (presumption of *Steelworkers Trilogy* "does not extend beyond the reach of the principal rationale that justifies it, which is that arbitrators are in a better position than courts to interpret the terms of a CBA [collective bargaining agreement]").

III.

THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THE RELEVANT DECISIONS OF THIS COURT AND WITH ANOTHER COURT OF APPEALS THAT, ABSENT A "CLEAR AND UNMISTAKABLE WAIVER," A PARTY TO A CBA DOES NOT WAIVE ITS STATUTORY RIGHTS.

Congress intended that Section 303 claims would not be arbitrated. Petitioner submits that, even if an employer could choose to waive the federal court forum in favor of arbitration, the courts should not deprive any employer of its Section 303 right to direct suit absent the clearest and most unmistakable waiver of that Congressionally ordained right. Yet, the Second Circuit held that IBC's right to assert its federal statutory claim could be "limited to an arbitral forum even though the agreement requiring arbitration of that claim did not contain a 'clear, explicit statement' to that effect." App. A at 13a. In *Wright v. Universal Maritime Service Corp.*, *supra*, 119 S. Ct. at 392, this Court held as follows:

> In order for a union to waive employees' rights to a federal judicial forum for statutory antidiscrimination claims, the agreement to arbitrate such claims must be clear and unmistakable.

In this case, the Second Circuit held that the "clear and unmistakable" waiver doctrine did not apply to IBC's Section 303 claim because "[w]here, however, one waives one's own

rights, the 'clear and unmistakable' standard is not required."[6] App. A at 8a. The Second Circuit's decision conflicts with relevant decisions of this Court and effectively vitiates this Court's "clear and unmistakable" doctrine. The "clear and unmistakable" waiver doctrine applies to the employer's and the union's rights. *Metropolitan Edison Company v. NLRB*, 460 U.S. 693, 708 (1983) (footnote omitted), held as follows:

> Thus, we will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is "explicitly stated." More succinctly, the waiver must be clear and unmistakable.

See also Uforma/Shelby Business Forms, Inc. v. NLRB, 111 F.3d 1284, 1289-90 (6th Cir. 1997) (union waives right to bargain over elimination of shift only if waiver in collective bargaining agreement is "clear and unmistakable").

Moreover, the Second Circuit's decision regarding the application of the "clear and unmistakable waiver" doctrine conflicts with the decision of another United States court of appeals on this important matter. *Vulcan Materials Co. v. United Steelworkers*, 430 F.2d. 446 (5th Cir. 1970), *cert. denied*, 401 U.S. 963, 91 S. Ct. 974 (1971) held that a Section 303 claim was not arbitrable because the arbitration provision did not contain a clear, explicit statement which provided for

---

6. As a result, the following injustice occurred: The parties' CBA arbitration procedures excluded disputes concerning changes in distribution methods. Yet, the Second Circuit compelled arbitration of the secondary boycott issues and damage claims resulting from the Union's strike regarding alleged changes in distribution methods.

arbitration of the Section 303 claim.[7] *See also Bechtel Corp. v. Local 215,* 405 F. Supp. 370, 376-77 (M.D. Pa. 1975) (no waiver unless arbitration clause clearly and explicitly covers Section 303 claim), *aff'd on other grounds*, 544 F.2d 1207 (3rd Cir. 1976); *Waco Scaffolding Co. v. Local 845*, 585 F. Supp. 102, 107 (E.D. Pa. 1984) (same); *contra Farmland Dairies, Inc. v. Milk Drivers & Dairy Employees Union Local 680, Inter. Broth. of Teamsters, AFL-CIO*, 956 F. Supp. 1190 (D.N.J. 1997) (Section 303 claim arbitrable; facts underlying Section 303 claim "germane" to employer's allegations of breach of contract [in present case, Second Circuit found underlying dispute was not relevant to Section 303 claim; IBC did not contend that the Union breached the CBA]).[8]

---

7. The arbitration provision in *Vulcan Materials Co.* provided that the parties should submit to arbitration "any local trouble aris(ing) in any plant." Neither that arbitration clause nor the arbitration clause in this case (see footnote 2) clearly and unmistakably waives the employer's right to the Section 303 forum which Congress clearly and unmistakably established.

8. In *Old Dutch Farms, Inc. v. Milk Drivers & Dairy Emp. Local 584, IBT*, 359 F.2d 598, 603 (2nd Cir. 1966), *cert. denied*, 385 U.S. 832 (1969), the Second Circuit reversed the District Court's order requiring arbitration of a Section 303 claim and had held that

> absent a clear, explicit statement in the collective bargaining contract directing an arbitrator to hear and determine the validity of tort damage claims by one party against another, it must be assumed that the employer did not intend to forego his rights under Section 303 and that the parties did not intend to withdraw such disputes from judicial scrutiny.

Yet, in the present case, the Second Circuit denied IBC's right to the protection of this Court's "clear and unmistakable" waiver doctrine.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LEONARD SINGER
Counsel of Record
GREGORY D. BALLEW
BIOFF SINGER AND FINUCANE, LLP
Attorneys for Petitioner
The Stilwell Building
Suite 400
104 West Ninth Street
Kansas City, Missouri 64105-1718
(816) 842-8770